

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CAMILLE CLARK,

Petitioner,

vs.

McDANIEL, *et al.*,

Respondents.

3:07-cv-0490-RCJ-RAM

ORDER

This action is a *pro se* petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. This matter comes before the Court on the merits of the petition.

I. Procedural History

Petitioner was charged with four counts of conspiracy to commit robbery, fourteen counts of robbery with the use of a deadly weapon, and four counts of burglary while in possession of a firearm. (Exhibit 2).¹ The matter proceeded to trial, which was held from May 31, 2005, through June 2, 2005. (Exhibits 2-6). Petitioner was sentenced to 24-60 months on each of the four conspiracy counts; 60-180 months on each of the robbery counts, plus equal and consecutive terms

¹ The exhibits referenced in this order appear in the Court's record at ECF No. 16 & 24.

1 of 60-180 months for use of a deadly weapon on each robbery count; and 36-90 months on each of
2 the burglary counts.

3 Petitioner filed a notice of appeal from his conviction. (Exhibit 9). On May 24, 2006, the
4 Nevada Supreme Court affirmed the judgment of conviction. (Exhibit 10).

5 On September 1, 2006, petitioner filed a post-conviction habeas petition in state court.
6 (Exhibit 12). The petition was denied by the trial court. (Exhibit 13). Petitioner appealed, and the
7 Nevada Supreme Court affirmed the denial of the state habeas petition in an order entered September
8 25, 2007. (Exhibit 14).

9 Petitioner dispatched his federal habeas petition to this Court on October 17, 2007. (ECF No.
10 6). Respondents filed a motion to dismiss the petition on June 19, 2008. (ECF No. 16). On January
11 21, 2009, this Court denied petitioner's motion to dismiss and directed respondents to file an answer.
12 (ECF No. 20). Respondents filed an answer. (ECF No. 24). Petitioner filed an opposition to the
13 answer, which is construed as a reply. (ECF No. 25).

14 **II. Federal Habeas Corpus Standards**

15 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254(d),
16 provides the legal standard for the Court's consideration of this habeas petition:

17 An application for a writ of habeas corpus on behalf of a person
18 in custody pursuant to the judgment of a State court shall not be
19 granted with respect to any claim that was adjudicated on the merits in
20 State court proceedings unless the adjudication of the claim –

21 (1) resulted in a decision that was contrary to, or involved an
22 unreasonable application of, clearly established Federal law, as
23 determined by the Supreme Court of the United States; or

24 (2) resulted in a decision that was based on an unreasonable
25 determination of the facts in light of the evidence presented in the State
26 court proceeding.

27 The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications
28 in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect

1 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court
2 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C.
3 § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme
4 Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from
5 a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme
6 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529
7 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

8 A state court decision is an unreasonable application of clearly established Supreme Court
9 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
10 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
11 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,
12 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more
13 than merely incorrect or erroneous; the state court’s application of clearly established federal law
14 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

15 In determining whether a state court decision is contrary to, or an unreasonable application of
16 federal law, this Court looks to the state courts’ last reasoned decision. *See Ylst v.*
17 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th
18 Cir. 2000), *cert. denied*, 534 U.S. 944 (2001). Moreover, “a determination of a factual issue made by
19 a State court shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting
20 the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

21 **III. Discussion**

22 **A. Ground One**

23 Petitioner alleges that “during closing arguments, the prosecution repeatedly made improper
24 arguments and committed prosecutorial misconduct which deprived petitioner of his rights”
25 (ECF No. 6, at p. 3). Petitioner raised this claim in his direct appeal to the Nevada Supreme Court,
26

1 and the issue was discussed in the Court's order of affirmance. (Exhibit 10). In denying the claim,
2 the Nevada Supreme Court noted that petitioner failed to make a timely objection, and relied on
3 *Allred v. State*, 120 Nev. 410, 418, 92 P.3d, 1246, 1252 (2004), for the rule that "failure to object to
4 an issue at trial will generally preclude appellate review of that issue unless there is plain error."
5 (Exhibit 10, at p. 2). The Nevada Supreme Court went on to find that petitioner failed to show plain
6 error. The Court ruled that:

7 Even assuming it was error for the state to make such an argument,
8 improper comments may constitute harmless error when there is
9 overwhelming evidence of guilt and the remarks did not contribute to
10 the verdict. Here, there was overwhelming evidence of Clark's guilt
11 consisting of videotape footage, photographs, multiple victim and
12 eyewitness accounts of Clark as a perpetrator and latent fingerprints.

13 (Exhibit 10, at p. 2) (footnotes and citations omitted). In rendering its decision, the Nevada Supreme
14 Court cited and used the correct federal standard, *United States v. Young*, 470 U.S. 1 (1985). When a
15 party fails to lodge an objection, a reviewing court should conduct a harmless error analysis. *United*
16 *States v. Young*, 470 U.S. at 6 (citing *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

17 In the instant case, the Nevada Supreme Court found no harmless error, as there was
18 overwhelming evidence of petitioner's guilt. The factual findings of the state court are presumed
19 correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state
20 court's ruling was contrary to, or involved an unreasonable application of, clearly established federal
21 law, as determined by the United States Supreme Court, or that the ruling was based on an
22 unreasonable determination of the facts in light of the evidence presented in the state court
23 proceeding. The Court will deny habeas relief with respect to Ground One.

24 **B. Ground Two**

25 Petitioner alleges that his trial counsel failed to object to the "all white jury." Petitioner
26 further alleges that his trial counsel failed to object to a jury that did not comprise a fair cross-section
of the community. (ECF No. 6, at p. 6). As to the first part of petitioner's claim, this was raised in
petitioner's state habeas petition. In ruling on the claim, the Nevada Supreme Court held:

1 Appellant did not demonstrate that his trial counsel acted unreasonably
2 in failing to object to the composition of the jury or that he was
3 prejudiced by his counsel's failure to do so. Appellant did not have the
4 "right to a 'petit jury composed in whole or in part of persons of his
5 own race.'" Further, appellant did not allege, and there is nothing in
6 the record to suggest, that the State exercised its peremptory challenges
7 on the basis of race. The record indicated that three African-
8 Americans were initially seated on appellant's jury; however, the
9 district court removed one of the individuals for cause, and the defense
10 exercised its peremptory challenges to remove the other two
11 individuals. Therefore, the district court did not err in denying this
12 claim.

13 (Exhibit 14, at pp. 3-4) (footnotes and citations omitted). In ruling on this claim, the Nevada
14 Supreme Court cited and applied *Strickland v. Washington*, 466 U.S. 668 (1984) and *Batson v.*
15 *Kentucky*, 476 U.S. 79, 85 (1986), the correct federal standards. The factual findings of the state
16 court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of
17 proving that the state court's ruling was contrary to, or involved an unreasonable application of,
18 clearly established federal law, as determined by the United States Supreme Court, or that the ruling
19 was based on an unreasonable determination of the facts in light of the evidence presented in the
20 state court proceeding. The Court will deny habeas relief with respect to the first part of Ground
21 Two.

22 As to the second part of Ground Two, the allegation that his trial counsel failed to object to a
23 jury that did not comprise a fair cross-section of the community, this issue was raised in petitioner's
24 state habeas petition. In ruling on the claim, the Nevada Supreme Court held:

25 To demonstrate a prima facie violation of the fair cross-section
26 requirement, a defendant must demonstrate that (1) the group he
alleges was excluded was "a distinctive group in the community;" (2)
the group's representation "in jury venires is not fair and reasonable in
relation to the number of such persons in the community;" and (3) the
underrepresentation is due to "systematic exclusion of the group in the
jury-selection process." Appellant failed to carry the burden of
establishing a prima facie violation of this doctrine. Although he
sufficiently identified distinctive groups, he failed to carry his burden
of establishing either underrepresentation or systematic exclusion.
First, although he stated that three members of his jury panel were
African-American, appellant did not provide the statistical data
necessary for determining relative underrepresentation as required by

1 the second prong of the Duren test. Second, appellant failed to
 2 demonstrate that the alleged underrepresentation was due to systematic
 3 exclusion of African-Americans or other distinctive groups in the jury
 4 selection process as required by the third prong. Because appellant
 5 failed to establish a prima facie violation of the fair cross-section
 6 doctrine, we conclude that appellant's counsel was not ineffective for
 7 failing to object. Therefore, the district court did not err in denying
 8 this claim.

9 (Exhibit 14, at pp. 4-5) (footnotes and citations omitted). The Nevada Supreme Court cited and
 10 applied *Strickland v. Washington*, 466 U.S. 668 (1984) and *Duren v. Missouri*, 439 U.S. 357 (1979),
 11 the correct federal standards. The factual findings of the state court are presumed correct. 28 U.S.C.
 12 § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was
 13 contrary to, or involved an unreasonable application of, clearly established federal law, as
 14 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
 15 determination of the facts in light of the evidence presented in the state court proceeding. The Court
 16 will deny habeas relief with respect to the entirety of Ground Two.

17 **C. Ground Three**

18 Petitioner asserts that he was denied effective assistance of counsel under the Sixth
 19 Amendment. Petitioner alleges that his counsel was ineffective in the following ways: (1) advising
 20 petitioner to waive his right to a preliminary hearing; (2) failing to remain in contact with him prior
 21 to trial; (3) failing to contact witnesses, obtain expert testimony regarding fingerprint and
 22 identification evidence, conduct DNA testing, and ensure a physical lineup; and (4) failing to object
 23 to prosecutorial misconduct (improper statements) during trial. (ECF No. 6, at pp. 11-30).

24 **1. Advising Petitioner to Waive his Right to Preliminary Hearing**

25 The Nevada Supreme Court held that petitioner did not establish a prima facie claim of
 26 ineffective assistance of counsel, as follows:

Appellant did not establish that he was prejudiced by his counsel's
 actions. The district court personally addressed appellant concerning
 the waiver of his right to a preliminary hearing. Appellant waived his
 right in open court after he was advised by the court that his waiver
 was unconditional and could not be withdrawn if the plea negotiations

1 did not result in an acceptable plea bargain. Moreover, there was
2 overwhelming evidence of appellant's guilt. Six witnesses from three
3 of the four locations identified appellant as one of the men involved in
4 the robberies. Surveillance video and photographs of all four of the
5 robberies were shown to the jury. Appellant's uncle identified him in
6 the surveillance photographs and testified to that effect. In addition,
7 appellant's fingerprint was recovered from one of the crime scenes.
8 As there was overwhelming evidence of appellant's guilt, and
9 appellant voluntarily and unconditionally waived his right to a
10 preliminary hearing, he did not show that he was prejudiced by his
11 counsel's advice. Therefore, the district court did not err in denying
12 this claim.

13 (Exhibit 14, at pp. 5-6) (footnotes and citations omitted). The factual findings of the state court are
14 presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that
15 the state court's ruling was contrary to, or involved an unreasonable application of, clearly
16 established federal law, as determined by the United States Supreme Court, or that the ruling was
17 based on an unreasonable determination of the facts in light of the evidence presented in the state
18 court proceeding. The Court will deny habeas relief with respect to the first part of Ground Three,
19 Part One.

20 **2. Failing to Remain in Contact Prior to Trial**

21 Petitioner asserts that his trial counsel failed to maintain adequate contact with him prior to
22 trial. The Nevada Supreme Court considered this claim and rejected it:

23 Fourth, appellant claimed that his counsel was ineffective for failing to
24 remain in contact with him prior to trial. Appellant did not allege any
25 specific facts in relation to his claim. A petitioner is not entitled to
26 relief where his claims are unsupported by any specific factual
allegations. Therefore, the district court did not err in denying this
claim.

(Exhibit 14, at p. 6) (footnotes and citations omitted). Petitioner's federal petition contains no more
specific factual allegations than his state petition did. The factual findings of the state court are
presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that
the state court's ruling was contrary to, or involved an unreasonable application of, clearly
established federal law, as determined by the United States Supreme Court, or that the ruling was

1 based on an unreasonable determination of the facts in light of the evidence presented in the state
2 court proceeding. The Court will deny habeas relief with respect to the first part of Ground Three,
3 Part Two.

4 **3. Failing to Contact Witness, Obtain Expert Testimony Regarding Fingerprint**
5 **and Identification Evidence, and Failure to Conduct DNA Testing and Physical**
6 **Line-up**

7 Petitioner claims that his trial counsel failed to contact witness, failed to obtain expert
8 testimony regarding fingerprint and other identifying evidence, and failed to conduct DNA testing
9 and a physical line-up. The Nevada Supreme Court ruled on this claim and rejected it:

10 Appellant did not demonstrate that his trial counsel's performance was
11 deficient or that he was prejudiced. Appellant failed to identify
12 possible or potential experts on fingerprints or identification evidence
13 or the potential testimony these experts would have offered. Appellant
14 provided no support, other than his bare allegation, that his counsel did
15 not interview the witnesses. Moreover, appellant did not identify the
16 information that would have been obtained had his counsel
17 interviewed the witnesses. Further, appellant did not show that a
18 possible negative test for his DNA on the sweater that the State alleged
19 he wore during the robberies would have significantly undermined the
20 numerous witness identifications and surveillance footage of him at the
21 robberies, and thus appellant failed to demonstrate that such evidence
22 would have altered the outcome of the case. Lastly, appellant did not
23 establish that a line-up in court would have undermined the testimony
24 of all six witnesses that identified him and rendered the surveillance
25 footage of the robberies unreliable. Thus, appellant did not show that
26 further investigation by his counsel would have resulted in a different
outcome at trial. Therefore, we conclude that the district court did not
err in denying this claim.

(Exhibit 14, at p. 7) (footnotes and citations omitted). The factual findings of the state court are
presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that
the state court's ruling was contrary to, or involved an unreasonable application of, clearly
established federal law, as determined by the United States Supreme Court, or that the ruling was
based on an unreasonable determination of the facts in light of the evidence presented in the state
court proceeding. The Court will deny habeas relief with respect to the first part of Ground Three,
Part Three.

4. Failing to Object to Prosecutorial Misconduct (Improper Statements)

Petitioner alleges that his counsel was ineffective for failing to object to the alleged improper statements by the prosecutor during closing arguments. As discussed earlier in this order, on direct appeal, the Nevada Supreme Court found no prosecutorial misconduct attributable to the statements made by the prosecutor during closing arguments. (Exhibit 10, at p. 1-3). The Nevada Supreme court found that, even assuming it was error for the State to make the challenged statements in closing argument, such error was harmless in light of the overwhelming evidence of petitioner's guilt. (Exhibit 10, at p. 2). In ruling on this issue on appeal from the denial of the state petition, the Nevada Supreme Court held:

Ninth, appellant claimed that his counsel was ineffective for failing to object to prosecutorial misconduct. This court considered and rejected an identical claim of prosecutorial misconduct on direct appeal. The doctrine of the law of the case prevents further litigation of the issues and cannot be avoided by a more detailed and precisely focused argument. Further, given the overwhelming evidence of guilt, appellant failed to demonstrate that the alleged misstatement prejudiced the outcome of the trial. Therefore, the district court did not err in denying this claim.

(Exhibit 14, at pp. 11-12). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The Court will deny habeas relief with respect to the first part of Ground Three, Part Four. In summary, petitioner is not entitled to federal habeas relief as to any portion of Ground Three.

IV. Certificate of Appealability

In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a

1 petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a
2 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
3 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's
4 assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In
5 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
6 debatable among jurists of reason; that a court could resolve the issues differently; or that the
7 questions are adequate to deserve encouragement to proceed further. *Id.* This Court has considered
8 the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a
9 certificate of appealability, and determines that none meet that standard. The Court will therefore
10 deny petitioner a certificate of appealability.

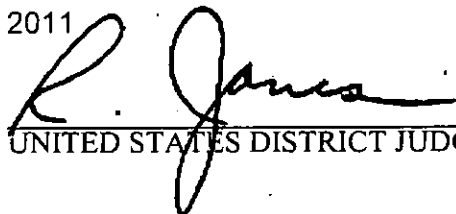
11 **V. Conclusion**

12 **IT IS THEREFORE ORDERED** that the petition for a writ of habeas corpus is **DENIED**
13 **IN ITS ENTIRETY.**

14 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
15 **APPEALABILITY.**

16 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
17 **ACCORDINGLY.**

18 Dated: February 25, 2011

19 
20 UNITED STATES DISTRICT JUDGE
21
22
23
24
25
26